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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-10

THE UNIVERSITY OF TENNESSEE, *et al.*,

Petitioners,

v.

RITA SANDERS GEIER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

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ARGUMENT

Pursuant to Rule 24(4) of this Court, the Petitioners, The University of Tennessee, its President, Edward J. Boling, the Board of Trustees of The University of Tennessee, the present members of the Board of Trustees and its Vice-Chairman, respectfully submit this Reply Brief for this Court's consideration with respect to their Petition for the Writ of Certiorari heretofore filed with this Court and presently pending disposition.

As of the date that this Reply Brief was prepared by Petitioners' counsel, the United States' Brief in opposition to their Petition had not been filed with the Court. Accordingly, Petitioners respectfully reserve the right to submit a Reply Brief in response to the Government's Brief in opposition, if such a response is appropriate.

It must be observed, prior to replying to certain of the arguments made by the Respondent, State Board of Regents, State University and Community College System of Tennessee, that those arguments should be considered in the light of the contrary position which it took in the District Court. The State Board of Regents joined with this Petitioner and the Petitioner, Tennessee Higher Education Commission, in formulating the Long-Range Plan for dismantling the dual system of higher education in Tennessee and fully supported that Plan in the trial of this action in the District Court. That Plan rejected merger as a solution and, instead, provided that certain course offerings would be allocated exclusively to UTN or TSU while certain other courses would be offered jointly and cooperatively by the two institutions. This Plan was submitted to the District Court by the State Defendants as a proper remedy for achieving further desegregation at both institutions. During the trial in the District Court, the State Board of Regents opposed merger as a remedy, and its Chief Executive Officer, Chancellor Roy Nicks, testified that he was committed to the Long-Range Plan and that, in his opinion, implementation of that Plan would satisfactorily eliminate existing racial imbalance in the State's system of higher education. (Appendix before Court of Appeals, pp. 1520, 1521). The State Board of Regents did not advocate merger until the District Court ordered a merger under that Board's jurisdiction. Since that time it has reversed its prior position and become an

advocate of merger in an obvious effort to protect the proprietary interest which it has acquired in the facilities, resources, faculty and students of what was formerly UTN.

Petitioners are compelled to respond to the contention advanced in the Response filed in this matter by the State Board of Regents to the effect that "the legal issues raised in the respective Petitions filed by the Tennessee Higher Education Commission and, more particularly, The University of Tennessee have been resolved by this Court in *Dayton Board of Education, et al v. Brinkman, et al,* ___ U.S. ___, 47 L.W. 4945 (unofficially), and *Columbus Board of Education, et al v. Penick, et al,* ___ U.S. ___, 47 L.W. 4924 (unofficially), adversely to the contentions argued by Petitioners." (p. 10, Brief of State Board of Regents).

The argument advanced is that because, among other arguments presented in their Petition filed in this matter, the Petitioners raised the question of whether the decisions of the United States Court of Appeals for the Sixth Circuit in those two cases conflicted with prior decisions of this Court, the issues involved in this case were somehow "resolved" by this Court's disposition of those cases. The fallacy of this assertion becomes readily apparent upon an examination of those two opinions and a consideration of the important differences between the factual and legal issues involved in those cases and those presented by this Petition.

The most obvious distinction between the factual and legal issues dealt with by this Court in the *Dayton* and *Columbus* cases and those presented by the instant case is that while those cases were concerned with public systems of elementary and secondary school education, The University of Tennessee at Nashville (UTN) and Tennes-

see State University (TSU) are institutions of higher education whose doors are open to all students. It is utterly unrealistic to contend that there is no distinction, for purposes of determining whether there has been a violation of the Fourteenth Amendment, between the analytical approach which must be taken with respect to colleges and universities whose students are free to attend the institution of their choice and that approach which is appropriate with respect to elementary and secondary school education where educational authorities can and necessarily do control the racial balance of particular schools by establishing geographical attendance zones, controlling transfer policies, assigning teachers and promulgating various policies which have a practical effect upon what schools particular students will attend.

Further, any reasonable reading of the language of this Court's Opinions in the *Dayton* and *Columbus* cases discloses that those decisions do not represent a departure from established precedent. Nothing in either of those decisions is inconsistent with the arguments advanced by the Petitioners.

Respondent apparently interprets the *Dayton* and *Columbus* decisions as justifying whatever remedies the District Court determines to be necessary to correct racial imbalance where it is shown that at one time, however remotely in the past, *de jure* segregation was practiced by school officials within a particular state and there remains racial imbalance in any given school within that state. Further, it is apparently Respondent's position that these two decisions not only justify the imposition of a remedy but that the mere existence of such a situation justifies the imposition of a remedy against a school within a separate system of education from that within which the Constitutional violation was found to exist. Such an interpre-

tation is a marked departure from the teachings of this Court's prior decisions regarding the prerequisites for finding a Constitutional violation and the proper limitations upon the District Court's authority to fashion a remedy. It is respectfully submitted that a correct reading of *Dayton* and *Columbus* refutes Respondent's interpretations.

In the *Columbus* case the District Court found that school officials had been guilty of conduct which was intended to and did promote racial segregation, and the Court of Appeals made a similar finding in the *Dayton* case. *Columbus Board of Education v. Penick*, 99 S. Ct. 2941, 2948-2950 (1979); *Dayton Board of Education v. Brinkman*, 99 S. Ct. 2971, 2980 (1979). Further, in the *Columbus* decision, this Court expressly reiterated the principle that a racially discriminatory impact *per se* is not sufficient to establish that the Fourteenth Amendment has been violated, absent a showing of purposeful discriminatory conduct and that the existence of an intent to discriminate may not properly be inferred from the fact that particular acts have a racially discriminatory impact. *Columbus Board of Education v. Penick, supra* at 2950.

In the instant case neither the District Court nor the Court of Appeals found that the construction and operation of UTN was motivated by any discriminatory purpose, nor was there a finding of any intentionally discriminatory conduct on the part of any state official with respect to the operation of either of Tennessee's systems of higher education. On the contrary, as pointed out and discussed in more detail in the Petition filed in this case, the District Court expressly found, in its 1968 Opinion, that State officials had not been guilty of "Constitutionally impermissible acts", either presently or in the recent past, and, further, found that the motivation for the

expansion and operation of UTN was to provide educational opportunities "for employed persons of all races who must seek their education at night". *Sanders v. Ellington*, 288 F. Supp. 937, 940, 941 (M.D. Tenn. 1968). Neither the District Court nor the Court of Appeals ever made any finding of fact which conflicts with these findings.

As set forth and discussed more fully in the Petition for the Writ of Certiorari filed with this Court on behalf of these parties, the remedy imposed against them by the District Court and affirmed by the Court of Appeals was premised solely upon the fact that the student body of TSU has a disproportionately large number of black students. Accordingly, the decisions of the lower Courts failed to heed the teachings of *Washington v. Davis*, 426 U.S. 229 (1976), *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977) and other decisions of this Court which have firmly established that the racially disproportionate impact of a particular course of conduct may not properly be equated with a discriminatory purpose. (This analysis of the lower courts' rationale assumes *arguendo* the validity of the somewhat dubious proposition that the exercise by black students of their right to attend TSU may realistically be thought of as an "impact" upon them resulting from someone else's conduct).

Even if, contrary to this Court's repeated pronouncements on this point, a discriminatory purpose could properly be inferred solely from the existence of a racial imbalance at particular schools, such inference would be inappropriate in the context of higher education. Inasmuch as it is undisputed that students in Tennessee exercise a free and unfettered choice with respect to the institutions which they will attend and, further, educational

officials have affirmatively encouraged black students to attend predominantly white institutions, which encouragement is in part responsible for the state-wide progress in integration of institutions of higher education which the District Court found to satisfy Constitutional requirements, the only rational inference to be drawn from this situation is that the continued, though steadily decreasing black predominance at TSU is a result of the exercise of free choice by students. Clearly the existence of such a situation is not a sufficient basis to invoke the remedial powers of the Federal Courts.

A further very important distinction between the *Dayton* and *Columbus* factual situations and that presently before the Court is that both of those decisions involved a single school system within which certain schools were found to be "black enclaves", whereas here the District Court's remedy was imposed against an institution which is part of an entirely separate school system from that within which the situation violative of the Constitution was found to exist, and the school system against which the remedy was imposed was not found to have been guilty of any discriminatory conduct. In fact, the District Court expressly found that the state-wide progress of racial integration within the University of Tennessee school system met Constitutional standards, and the racial balance of UTN itself roughly approximates the racial composition of the population which it serves. Accordingly, as set forth in the Petition, the Courts below, by having imposed a remedy against a separate school system which has not been found to be guilty of intentional discriminatory conduct violated the fundamental principle enunciated by this Court in *Milliken v. Bradley*, 433 U.S. 267 (1977) that an inter-system remedy should not be imposed unless an inter-system violation is found.

Thus, contrary to the contention advanced by the State Board of Regents, it is apparent that the *Dayton* and *Columbus* decisions do not "resolve" the issues presented by this case. In fact, these opinions and their reaffirmation by this Court of certain fundamental principles previously announced with respect to the duties and obligations of school officials in the elementary and secondary school context only serves to bring into sharp focus the necessity for this Court to provide guidance and standards relative to what is required of state officials in dealing with racial imbalance in institutions of higher education, a matter as to which this Court has never definitively spoken.

CONCLUSION

For the reasons set forth herein and in the Petition heretofore filed with this Court on behalf of these parties, it is respectfully submitted that the petition for the Writ of Certiorari should be granted and this case should be reviewed by this Court.

Respectfully submitted,

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